IN THE CORPORATION COURT FOR THE CITY OF STAUNTON.

COMMONWEALTH *v.* FRANK RICHARDSON.

Aug. 22, 1908.

Sentence to Jail for Five Years for Assault Legal.—A verdict finding a defendant guilty of a misdemeanor, assault, and fixing his punishment at confinement for five years in jail and a fine of $250, does not impose a cruel or unusual punishment under the ninth section of the Virginia Bill of Rights, and is legal.

For the Commonwealth, *Carter Braxton.*
For the defendant, *Curry* and *Curry.*

H. W. HOLT, Judge. The indictment here charges that Frank Richardson, on the 5th day of June, 1908, in the City of Staunton, made an assault on one B. W., with intent to commit rape.

At the August Term of this Court this cause came on for trial. It was submitted to the jury upon evidence introduced and instructions given. The verdict of the jury was as follows:

"We, the jury, find the accused not guilty of felony, and find him guilty of assault, and fix his punishment by confinement in the city jail for a term of five years, and assess a fine of $250 against him."

(Signed) L. G. STRAUSS, Foreman.

The evidence shows that B. W., a white woman, on the night of June 5th, 1908, while on her way to her home, was followed by the accused, a negro man, to whom she was a total stranger, who overtook her in a lonely place, threw his arms around her, and attempted to throw her down. She screamed, broke away from him, and escaped. The jury, upon this evidence, under instructions from the Court, was unable to say that an attempt to commit rape had been proved beyond a reasonable doubt; and therefore convicted the prisoner of an assault only.

When this verdict had been returned into Court, counsel for the defense asked that it be set aside, as excessive, cruel and unusual, and therefore unconstitutional.

At common law, and by statute in Virginia (§ 3902, Code 1904), assault is a crime punishable by fine or imprisonment, either, or both, in the discretion of the jury. A discretion without limit, unless it be, as some authorities hold, that life imprisonment cannot be inflicted. (25 Am. & Eng. Encyc. of Law, 319.) It is therefore clear that this verdict cannot be disturbed unless it violates some constitutional provision. The 8th Amendment to the Federal Constitution is a limitation on federal power, and need not be considered here. We must look alone to the 9th

Section of the Virginia Bill of Rights—which holds "that excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted"—for relief, if relief can be granted at all.

In the consideration of the effect of this constitutional provision, we must bear in mind that the restrictions there imposed on the power to punish rest with equal weight on the Legislature and on the Courts, and no judgment of a court imposing punishment is unconstitutional unless it be that a statute which imposes the punishment inflicted for the crime in judgment would be. We must also remember that while excessive fines are unconstitutional, excessive punishment is not. The punishment must be cruel or unusual. Its character and not its quantum determines its validity.

In Aldrich *v.* Commonwealth, 2 Va. Cases, 447, the Court said:

"As to the ninth Section of the Bill of Rights, denouncing cruel and unusual punishments, we have no notion that it has any bearing on this case. That provision was never designed to control the legislative right to determine *ad libitum* upon the *adequacy* of punishment, but is merely applicable to the modes of punishment. We had existed for a considerable time as a community, regulated by laws guarded by penal sanctions, when this Bill of Rights was declared. We considered these sanctions as sufficiently rigorous, and we knew that the best heads and hearts of the land of our ancestors, had long and loudly declaimed against the wanton cruelty of many of the punishments practised in other countries; and this section in the Bill of Rights was framed effectually to exclude these, so that no future Legislature, in a moment, perhaps of great and general excitement, should be tempted to disgrace our Code by the introduction of any of those odious modes of punishment."

We might rest here, for this case is conclusive of the one at bar; but will, however, consider somewhat in detail the arguments of counsel and the general law bearing upon the point in issue.

It is said that the accused has been found guilty of a misdemeanor only and not of a felony, and that five years imprisonment in the county jail appears upon its face to be a punishment both cruel and unusual, for an offence not felonious. This argument, it is believed, is based upon a misconception of the distinction between felonies and misdemeanors. At common law, an offence was a felony which occasioned a total forfeiture of either lands or goods or both, to which capital punishment might be superadded according to the degree of guilt; all other offences were misdemeanors. (4 Blackstone Commentaries, 95.) But

in this country felonies and misdemeanors are words without meaning except as their import is fixed by statute. (Mitchell *v.* State, 42 Ohio 386.) In Virginia, offences are felonies which may be punished by death or confinement in the penitentiary; all others are misdemeanors. (Barker *v.* Commonwealth, 2 Va. Cases, 182.) Crimes which are today misdemeanors may be tomorrow felonies, at the legislature's pleasure. To steal 20 bushels of sand from the Potomac River, to buy a railroad spike with intent to defraud the railroad, to maliciously wound a cow, are now felonies. Originally trivial misdemeanors, they have, by legislative enactment, been elevated to the dignity of crimes of the greater character. If this may be done, then *a fortiori* the legislature may, in cases of aggravated assault like that at bar, impose a punishment far exceeding in severity that of the sentence we are now considering. If the legislature may do this, then the court is without power to declare this verdict unconstitutional; a verdict which deprives the accused of no civil right, and which, at most, but compels him to work on the public highways for five years.

It is also said that for the felony charged, on a verdict of guilty, three years in the penitentiary might be the sentence; and that therefore, for the lesser offence of assault, five years cannot be imposed. To that, the answer is this: The legislature might with propriety enact such a law as a matter of public policy, but it has not. Should we adopt such a standard, our statute might be changed tomorrow. It might fix five years in the penitentiary as a minimum sentence to be imposed on conviction for said felony, and the maximum for assault would be correspondingly increased. A verdict which would today be unconstitutional might tomorrow be free from such objection. And yet it is perfectly clear that no act of the legislature can remotely determine what punishment is "cruel or unusual;" for, as we have already observed, the Bill of Rights rests alike on the legislature and the courts.

In the following cases, punishments were inflicted for crimes which appear to be comparatively trival, that exceeded in severity that here imposed:

Hobbs *v.* State, 133 Ind. 404; State *v.* Teeter, 97 Iowa 458; People *v.* Smith, 94 Mich. 444; State *v.* Carson, 67 N. J. L. 178; Jones *v.* Oklahoma, 43 Pac. Rep. 1072.

In all of these cases, the punishment inflicted was held to be neither cruel nor unusual. See, also, § 1903, Cooley on Constitutional Limitations.

Authorities might be multiplied, but these are deemed sufficient. Indeed, the only case to the contrary, to which we have been cited, was that of State *v.* Driver, 78 N. C. 423. Here it

was held that five years imprisonment for assault and battery was cruel and unusual. We have not had access to this case, and can not therefore follow the reasoning set forth. It is in direct conflict with Aldrich's Case, *supra*. It is against the great current of authority, against good reason, and must in the nature of things rest only on the *ipse dixit* of that court.

For these reasons in writing, filed with and made a part of the record, the motion to set aside the verdict of the jury will be overruled and sentence imposed according therewith.

A writ of error was denied in this case by the Supreme Court of Appeals.

Note.

The first impulse of nearly every lawyer under whose eye the statement of law contained in the syllabus to this case falls, will no doubt be to say or at least to think: "What, a five year jail sentence for a misdemeanor! Impossible!" But when he has read the carefully considered, logical opinion of Judge Holt, and casts about for authority to fortify his first impression, he will at least be compelled to say, as was the writer, that there is much less of it than he thought. Before taking up the question of what is or is not a legal punishment for simple assault, a few observations upon misdemeanors and their nature and punishment generally, may not be amiss.

Felonies and Misdemeanors Distinguished.—Such offences as may be punishable with death or confinement in the penitentiary are declared to be felonious; all other offences are misdemeanors. V. C. (1904), § 3879; Benton's Case, 89 Va. 570. Minor's Syn. Cr. Law, p. 17. In other words: "All offences which are neither treason nor felony, or, in Virginia, all which are not felony, are with us misdemeanors. (4 Bl. Com. & n. (5); 1 Whart. Cr. L. (8th ed.) §§ 22-23; 1 Russ. Cr. 43; V. C. 1887, ch. 190, § 3879.)" Min. Syn. Cr. Law, p. 17, where it is also said: "In quite a number of cases our Virginia statutes submit it to the discretion of the jury whether an offence shall be punished with confinement in the penitentiary or in the jail, or by fine only; and in those cases it may be a question whether the act is a felony or a misdemeanor. The doctrine seems clearly established that in such cases, whatever may be the verdict of the jury, the offence is always to be deemed a felony. (1 Bish. Crim. Law (7th Ed.), § 619; 4 Am. and Eng. Enc. of Law, p. 651; Johnston *v.* State, 7 Mo. 183; Canada's Case, 22 Grat. 899; Benton's Case, 89 Va. 572, et seq.; State *v.* Smith, 32 Maine, 369; State *v.* Mayberry, 48 Maine, 218, 236; State *v.* Waller, 43 Ark. 381.)"

Punishment for Misdemeanors.—It is generally the rule that a misdemeanor, where no statute fixes the punishment, is punishable by fine or imprisonment in jail, or both, at the discretion of the court. Ex parte Garrison, 36 W. Va. 686, 15 S. E. 417. Thus, where an offense, though recognized by statute, has no penalty affixed to it, it is to be regarded as a common-law, not a statutory, offense; and its punishment is fine or imprisonment in jail, or both, in the discretion of the court. United States *v.* Marshall (D. C.), 6 Mackey, 34.

And where a sentence is within the statutory limits, it cannot be reversed as cruel and unusual, although it may be regarded as severe. Cummings *v.* People, 42 Mich. 142, 3 N. W. 305. Thus, no sentence is excessive, in legal contemplation, which is not greater

than the maximum sentence fixed by law for punishment of the offence. Goddin *v.* State, 51 S. E. 598, 123 Ga. 569. Fitts *v.* City of Atlanta, 121 Ga. 567, 49 S. E. 793, 67 L. R. A. 803, 104 Am. St. Rep. 167; State *v.* Sheppard, 54 S. C. 178, 32 S. E. 146; State *v.* Landers, 68 S. C. 192, 47 S. E. 55; Jackson *v.* United States, 102 Fed. 473; Siberry *v.* State, 149 Ind. 684, 39 N. E. 936. In Shields *v.* State, 149 Ind. 395, 49 N. E. 351, it was held that Const. Art. 1, § 16, against cruel and unusual punishments, had reference to the statute fixing the punishment and not to the punishment assessed by the jury within the limits fixed by the statute. If within the statute, it is not excessive. See also, McDonald *v.* Com., 173 Mass. 322, 53 N. E. 874.

It is not so much the extent as the nature of the punishment that makes it cruel and unusual. Raymond *v.* United States, 25 App. D. C. 555. And the severity of a punishment, if not cruel or unusual, is a question for the law-making power alone. State *v.* Hogan, 63 O. St. 202, 58 N. E. 572, 52 L. R. A. 863, 81 Am. St. Rep. 626; In re Kemmler, 136 U. S. 436, 34 L. Ed. 519.

And some states have a statute provision that whenever the punishments of fine and imprisonment are left to the discretion of the court or jury, they shall not exceed certain limits. See State *v.* Pearson, 110 La. 387, 34 So. 575, Rev. Stat. 1876, § 982.

Instances.—For violation of local option law, a fine of $300, and imprisonment for 365 days, has been held not cruel and unusual. Ex parte Swann, 96 Mo. 44, 9 S. W. 10.

Ten years imprisonment for conspiracy to defraud, is not a cruel and unusual punishment. Howard *v.* Flemming, 191 U. S. 126, 48 L. Ed. 121.

Jail for two years, for carrying weapons, with work on roads, is not cruel and unusual. State *v.* Hanby, 126 N. C. 1066, 35 S. E. 614.

Where no time fixed by statute, imprisonment for two years, for selling liquor without a license, is not a cruel and unusual punishment. State *v.* Farrington, 141 N. C. 844, 53 S. E. 954.

Imprisonment in penitentiary at hard labor, under Ohio tramp law, for threatening injury to the person of another by a tramp, is not cruel and unusual. State *v.* Hogan, 63 O. St. 202, 58 N. E. 572, 52 L. R. A. 863, 81 Am. St. Rep. 626.

Ten years in state prison for swindling and conspiracy to defraud is not cruel and unusual. Howard *v.* Flemming, 191 U. S. 126, 48 L. Ed. 121.

For manslaughter in first degree 50 years imprisonment is not, as matter of law, a cruel and unusual punishment. Jones *v.* Territory, 4 Okl. 45, 43 Pac. 1072.

See also, O'Niel *v.* Com., 165 Mass. 446, 43 N. E. 183, where a sentence of three years hard labor, where there was no statute governing, except that the punishment must be according to the nature of the offense and not repugnant to the constitution, was legal.

Punishment for Assault.—There is no special punishment provided in Virginia for an assault, *eo nomine*, but by § 3902, misdemeanors, for which no punishment is provided by statute, are to be punished by fine or confinement in jail, or both, in the discretion of the jury, or of the court trying the case without a jury.

As said in a West Virginia case: "Assault and battery, generally punished by fine, and in grave cases by imprisonment also, is a daily instance in our courts of the application of this law. I know no limit to the fine and imprisonment save the constitutional clause that cruel and unusual punishment shall not be inflicted, and penalties shall be proportioned to the character and degree of the offense." Ex parte

Garrison, 36 W. Va. 686, 15 S. E. 417, 418. See also, State *v.* McKain, 56 W. Va. 128, 49 S. E. 20.

There is no limitation on the power of the jury in fixing the amount of fine or length of imprisonment, for assault and battery, except that cruel and excessive punishment prohibited by §§ 2 and 17 of the Kentucky Bill of Rights, must not be imposed. Cornelison *v.* Com., 84 Ky. 583, 2 S. W. 235, where it is said: "There are no degrees of the offense of assault and battery, except that, in imposing the punishment, the circumstances of the one case demand a greater punishment than the other. A mere assault is not as high an offense against the law as where accompanied by a battery; and an assault and battery with the mtent to rob or murder is a more aggravated assault than a mere assault and battery; and it may be said, in this way, that there are degrees of the offense. The punishment is graded by the enormity of the offense. The one becomes aggravated by reason of the attendant circumstances, and in such a case appeals to the jury (as it did to the judge at common law) for a heavy sentence or punishment. It is true that in England some assaults were deemed so aggravated, when made upon those in high positions, as to become the subject of statutory enactment, where the party guilty lost his entire estate, and was condemned to perpetual imprisonment. We have no such law in this state, nor has the legislature the power, if disposed, to inflict such a punishment. The case before us is an assault and battery by one private citizen upon another private citizen; by one lawyer upon his brother lawyer; and in that light only can this case be considered." Cornelison *v.* Com., 84 Ky. 583, 2 S. W. 235, 238, where it is also said: "There is a limitation for the protection for the citizen against all excessive punishment. That limitation is found in the second and seventeenth sections of the bill of rights; the second section providing 'that absolute, arbitrary power over the lives, liberty, and property of freemen exists nowhere in a republic, not even in the largest majority.' Section 17 provides 'that excessive bail shall not be required, nor excessive fines imposed, nor cruel punishment inflicted.'" See, however, State *v.* Reid, 106 N. C. 714, 11 S. E. 315, 316, where it is said: "This is a legal, and not an arbitrary discretion, and must be exercised within the limits of the constitution and the laws." Citing Driver's Case, 78 N. C. 423.

Examples.—In State *v.* Pettie, 80 N. C. 367, imprisonment in the county jail for two years for the aggravated assault and battery, in that case committed by the defendant on his wife, was held not to be a violation of the constitution. The court said: "There being no specific punishment provided by statute for such an offense, it was the duty of the judge, in the exercise of his legal discretion, to fix upon the term of imprisonment suited to the case, without restriction, save that in the constitution which forbids 'cruel or unusual punishments' to be inflicted." Quoted in State *v.* Reid, 11 S. E. Rep. 315, 316, 106 N. C. 718.

For assault and battery with deadly weapon, twelve months imprisonment and fine of $300 and costs was not excessive or cruel. State *v.* Reid, 106 N. C. 714, 11 S. E. 315.

Under the evidence in the case of Doyle *v.* Com., 100 Va. 808, 40 S. E. 925, it was held that a fine of $1,000 for an indecent assault upon a young lady cannot be said to be so excessive as to be prohibited by the Constitution, nor to manifest bias or prejudice on the part of the jury. The mere fact that the fine is double the maximum allowed in certain felonies is no evidence of excess in a case like this, where the legislature has interposed no statutory limitation on the amount. Here

the accused was found not guilty of assault with intent to commit rape, but guilty of assault and battery, and the punishment was fixed by the jury at a year's imprisonment in jail and $1,000 fine.

A fine of one cent and three years imprisonment is not cruel or excessive punishment for assault with a cane and cowhide. Cornelison v. Com., 84 Ky. 583, 2 S. W. 235.

In North Carolina, on conviction of any grade or kind of assault, the punishment may be fine or imprisonment in the county jail, or both, in the discretion of the court, but not in the penitentiary. State v. McNeil, 75 N. C. 15.

The question is, if the law-making power (the legislature) had undertaken to regulate the punishment for an assault and battery attended with the lash of the cowhide on the back of its citizens, what would likely be the fine and imprisonment imposed? This was the question addressed to the court and jury trying this case, and, in the exercise of their legal discretion, they have annexed a punishment that this court will not disturb. Neither the court nor the jurors could have closed their eyes to the cruelty and enormity of the offense committed. Cornelison v. Com., 84 Kentucky 583, 2 S. W. 235, 242.

Contra.—For assault and battery, aggravated, imprisonment for five years, held cruel and unusual. State v. Driver, 78 N. C. 423. This case was cited approvingly in State v. Reid, 106 N. C. 714, 11 S. E. 315, quoting therefrom this: "What the precise limit is cannot be prescribed. The Constitution does not fix it. Precedents do not fix it, and we cannot fix it; and it ought not to be fixed. It ought to be left to the judge who inflicts it, under the circumstances of each case, * * * and it ought not to be interfered with except * * * where the abuse is palpable."

And a punishment, on conviction of an assault, assessed at a fine of $1,000 and two years' confinement in the county jail, was excessive, where no violence was inflicted, and the only possible injury resulting from the assault, which was a kiss, was to the feelings. Chambless v. State, 79 S. W. 577, 46 Tex. Cr. R. 1.

But two years' imprisonment in the county jail is not an illegal penalty upon a husband for beating his wife so cruelly as to indicate malice. The constitution does not precisely define a "cruel or unusual punishment." State v. Pettie, 80 N. C. 367, 30 Am. Rep. 88. See also, State v. Haynie, 118 N. C. 1265, 24 S. E. 536.

Conclusions.—Thus it is plain that, by the great weight of authority, a punishment such as this for assault is not a cruel and unusual punishment. Misdemeanors, as we have seen, when no statute fixes the punishment, are punished by fine or imprisonment in jail, or both, practically at the discretion of the court or jury. The constitutional prohibition of cruel and unusual punishments is primarily addressed to the legislature and not to the courts, and where a statute has set limits to the punishment, it is almost never illegal if it does not exceed these limits. And it applies more to the nature of the punishment than to its extent or severity.

The most plausible ground of argument against the legality of such a verdict as this, is based upon the fact that, for other and aggravated assaults, the legislature has provided a lesser punishment, than was here inflicted, as a maximum for those offenses. But this is shown to be fallacious by the cases of Doyle v. Com., 100 Va. 808, 40 S. E. 925, and Cornelison v. Com., 84 Ky. 583, 2 S. W. 235, 239, in the former of which it is said, speaking of a fine for an assault claimed to be ex-

cessive: "The mere fact that the fine is double the maximum allowed in certain felonies, is no evidence of excess in a case like this, where the legislature has imposed no statutory limitation on the amount;" and in the latter it is said: "Some of the offenses known as misdemeanors were of such frequent occurrence in this state as to attract legislative attention; such as shooting and wounding another in sudden heat and passion, or shooting at another without inflicting a wound. Statutes have been passed imposing penalties severe in their character in such cases, for the reason that, under the common-law rule, slight punishments were too often imposed by courts and juries. Still those penalties are not to control or fix a limit to the punishment for aggravated assaults and batteries, or other high misdemeanors, where no statute has interposed. It is not necessary to draw a parallel between the enormity of the offenses mentioned and the one being considered." Cornelison *v.* Com., 2 S. W. 235, 242, 84 Kentucky 583.

It is also said in Doyle's Case, along the same line, that the fact that as to several other offenses of a very grave character the fine has been limited by statute to a sum not exceeding $500, is not persuasive of the conclusion to which it is adduced. The jury, independent of such statute, exercises a discretion controlled only in the manner which we have indicated. That the legislature has seen fit to restrict their power in certain cases, leaving it undiminished in others, would seem to have the opposite bearing, if any. Doyle *v.* Com., 100 Va. 808, 815, 40 S. E. 925.

Thus by § 3888 of the Code (1904), an assault in the attempt to commit a felony, not capital nor rape, but punishable by confinement in the penitentiary, is punishable only by confinement in jail not less than *six* or more than *twelve months,* i. e. it is only a misdemeanor, and an assault in the attempt to commit an offense punishable by jail or fine, i. e, a misdemeanor, is punishable by jail not more than six months, or fine not exceeding $100. And an assault in the attempt to commit grand or petit larceny is to be punished by fine, or imprisonment from 15 days to six months. And by § 3673 assault by unlawfully shooting at another in a street or place of public resort, etc., the punishment is jail not over one year, and fine not over $1,000. See Min. Syn. Cr. Law, pp. 76, 77.

See, however, the dissenting opinion in Doyle's Case, where Cardwell, J., takes the opposite view, saying: "Of the charge made in the indictment the jury acquitted the accused, but found him guilty of an assault and battery—a purely technical offence—fixing his punishment at one year's imprisonment in jail, and a fine of $1,000, a fine double the limit fixed by statute (§ 3671 of the Code), for the crime of shooting, etc., with intent to kill; by § 3672 for the crime of shooting, stabbing, etc., in the commission of or attempt to commit a felony; and by § 3706, for entering a dwelling house, etc., with intent to commit larceny, or any felony other than murder, rape or robbery." And again: "True, as the opinion of the court states, there is no express statutory limit to the fine that a jury may impose for a misdemeanor, but, as it seems to me, when considered in the light of the declaration, found in our bill of rights, that excessive fine ought not to be imposed, and in view of the fact that the legislature has limited the fine that may be imposed in felony cases to $500, it cannot be supposed that it was contemplated that, by vesting the jury with discretion in misdemeanor cases, the legislature conferred upon the jury the uncontrollable right to inflict greater punishment than had been fixed by statute for a felony." Doyle *v.* Com., 100 Va. 808, 823, 40 S. E. 925, per Caldwell, J., dissenting.

The fact that a writ of error was refused in this case, makes it one of importance, as its holding has thereby received the approbation of the supreme court of appeals, and is to a certain extent the law of the state until some further expression from that court or the legislature. It may well be that there should be some limit set by the legislature to such verdicts, and the case should recommend itself to the careful consideration of that body and of the bar generally.

J. F. M.

SUPREME COURT OF APPEALS OF VIRGINIA.

BALTIMORE & O. R. CO. *v.* COMMONWEALTH.

Sept. 16, 1909.

[65 S. E. 528.]

Railroads (§ 9*)—Orders of Corporation Commission—Appeal.—Where, on appeal from an order of the State Corporation Commission imposing a fine on a railroad company for its failure to comply with a prior order of the Commission, it appears from the record that the rights of an independent railroad company are materially affected by the order, and that the latter company was a necessary party and entitled to notice and opportunity to make a defense, the court will, in pursuance to Const. 1902, art. 12, § 156f (Code 1904, p. cclv), remand the case to the Commission for further proceedings.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 19; Dec. Dig. § 9.* 14 Va.-W. Va. Enc. Dig. (Supt.) 256, 870.]

Appeal from Order of State Corporation Commission.

Proceedings begun by complaint before the State Corporation Commission against the Baltimore & Ohio Railroad Company for failure to furnish adequate passenger terminal facilities at the Town of Harrisonburg. From an order of the commission imposing on the Baltimore & Ohio Railroad Company a fine for its failure to carry into effect a prior order of the Commission entered in the proceedings, it appeals. Reversed.

H. R. Preston and *Bumgardner & Bumgardner,* for appellant.
William A. Anderson, Atty. Gen., and *Robert B. Tunstall,* for the Commonwealth.

PER CURIAM. The transcript of the record in this case having been seen and inspected, the court is of opinion, and doth so decide and declare, that the Valley Railroad Company is an in-

*For other cases see same topic and section NUMBER in Dec. and Am. Digs. 1907 to date, and Reporter Indexes.